

01  
02  
03  
04  
05 UNITED STATES DISTRICT COURT  
06 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

07 ARLENE A.Z. NESBIT, )  
08 Plaintiff, ) CASE NO. C13-0830-MJP-MAT  
09 v. )  
10 CAROLYN W. COLVIN, Acting ) REPORT AND RECOMMENDATION  
Commissioner of Social Security, ) RE: SOCIAL SECURITY DISABILITY  
11 Defendant. ) APPEAL  
12 \_\_\_\_\_ )

13 Plaintiff Arlene A.Z. Nesbit proceeds through counsel in her appeal of a final decision  
14 of the Commissioner of the Social Security Administration (Commissioner). The  
15 Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and  
16 Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge  
17 (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all  
18 memoranda, the Court recommends this matter be REMANDED for further proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1972.<sup>1</sup> She completed high school and attended some  
21 \_\_\_\_\_

22 <sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 community college and technical college classes. (AR 48-49.) Plaintiff previously worked as  
02 a receptionist, dispatcher, waitress, and human resources assistant. (AR 32, 49-52, 187.)

03 Plaintiff filed an application for DIB on January 28, 2010 and protectively filed an  
04 application for SSI on December 21, 2009, alleging in both applications disability since June  
05 15, 2007. (AR 159-66.) Her applications were denied initially and on reconsideration, and  
06 she timely requested a hearing. ALJ Mattie Harvin-Woode held a hearing on October 19,  
07 2011, taking testimony from plaintiff and a vocational expert. (AR 41-86.) On January 26,  
08 2012, the ALJ rendered a decision finding plaintiff not disabled. (AR 21-34.)

09 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review  
10 on March 7, 2013 (AR 1-6), making the ALJ's decision the final decision of the Commissioner.  
11 Plaintiff appealed this final decision of the Commissioner to this Court.

### 12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining  
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
17 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had  
18 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be  
19 determined whether a claimant suffers from a severe impairment. The ALJ found the  
20 following impairments severe: major depressive disorder, generalized anxiety disorder,  
21 borderline personality disorder, thoracic and lumbar degenerative disc disease, osteoarthritis

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 status post bilateral knee arthroscopy, asthma, IBS, GERD, obesity, and chronic pain  
02 syndrome. Step three asks whether a claimant's impairments meet or equal a listed  
03 impairment. The ALJ found plaintiff's impairments did not meet or equal the criteria of a  
04 listed impairment.

05 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
06 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
07 demonstrated an inability to perform past relevant work. The ALJ found the following RFC:  
08 she can lift and/or carry twenty pounds occasionally and ten pounds frequently, stand and/or  
09 walk two hours and sit at least six hours in an eight-hour day; she can perform all postural  
10 activities frequently, but climb only occasionally; she must avoid concentrated exposure to  
11 extreme cold temperatures, pulmonary irritants, and workplace hazards; she can perform  
12 simple and some complex tasks, as long as no more than occasional contact with the public and  
13 superficial contact with coworkers is required. With that RFC, and with the assistance of a  
14 vocational expert, the ALJ found plaintiff unable to perform her past relevant work.

15 If a claimant demonstrates an inability to perform past relevant work or has no past  
16 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the  
17 claimant retains the capacity to make an adjustment to work that exists in significant levels in  
18 the national economy. With consideration of the Medical-Vocational Guidelines and the  
19 testimony of the vocational expert, the ALJ alternatively found jobs existed in significant  
20 numbers in the national economy plaintiff could perform, such as circuit board screener, table  
21 worker, and office clerk. The ALJ, therefore, concluded plaintiff was not under a disability at  
22 any time from the alleged onset date through the date of the decision.

01 This Court's review of the final decision is limited to whether the decision is in  
02 accordance with the law and the findings supported by substantial evidence in the record as a  
03 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
04 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
05 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
06 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
07 supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
08 F.3d 947, 954 (9th Cir. 2002).

09 Plaintiff argues the ALJ failed to fully and fairly develop the record, failed to properly  
10 evaluate the medical evidence or her testimony, and improperly determined her RFC and the  
11 conclusion at step five. She requests remand for payment of benefits or, in the alternative, for  
12 further proceedings. The Commissioner maintains the ALJ's decision has the support of  
13 substantial evidence and should be affirmed.

#### 14 Developing the Record

15 Plaintiff notes that, while she filed a prior application for disability benefits that was  
16 initially denied on March 13, 2009 (AR 185), that application and any associated documents are  
17 missing from the record. She further notes that, while she is currently alleging disability since  
18 June 15, 2007, the Social Security Administration apparently failed to request any medical  
19 records prior to October 2008. (*See* AR 576.) Plaintiff points to the ALJ's statement that "the  
20 medical evidence of record does not begin prior to 2008." (AR 28.)

21 "Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's  
22 duty to investigate the facts and develop the arguments both for and against granting benefits."

01 *Sims v. Apfel*, 530 U.S. 103, 111 (2000) (cited source omitted). Also, the Commissioner may  
02 reopen a determination in a DIB or SSI case within twelve months of the date of the initial  
03 determination for any reason. 20 C.F.R. §§ 404.988, 416.1488. Plaintiff argues the ALJ here  
04 failed to fulfill her duty to develop the record by including the prior disability file and obtaining  
05 all of her medical records from 2007 and 2008.

06 The Commissioner denies that the duty to develop the record extends to “culling  
07 evidence from other final determinations made by the Agency[,]” and maintains the possibility  
08 of reopening a prior application “is immaterial without persuasive evidence that plaintiff sought  
09 to do so.” (Dkt. 21 at 5.) The Commissioner notes that plaintiff bears the burden of proving  
10 disability, *Valentine v. Comm’r SSA*, 574 F.3d 685, 689 (9th Cir. 2009), and must provide  
11 medical evidence about her impairments and their severity, 20 C.F.R. §§ 404.1512(c),  
12 416.912(c). She maintains it is “significant” that plaintiff was not found disabled under her  
13 previous claim, and that “the medical records could hardly be material[.]” (Dkt. 21 at 5.)

14 The Court finds the Commissioner’s response to this issue unsatisfactory. Plaintiff  
15 filed her current applications for SSI and DIB in December 2009 and January 2010  
16 respectively. The fact that she filed a new claim for disability benefits within a year of the  
17 prior, March 13, 2009 denial of benefits (AR 185) appears to support an implicit request to  
18 reopen. See SSA Program Operations Manual System (POMS) DI 27501.005 (“How  
19 Reopening Issues May Arise”: “A party to the determination or decision requests (including  
20 implied requests) reopening by . . . filing a new claim (e.g., a denied claimant files a subsequent  
21 claim and alleges an onset of disability in the period adjudicated by the prior denial  
22 determination or decision).”) See also *Warre v. Commissioner of the Soc. Sec. Admin.*, 439

01 F.3d 1001, 1005 (9th Cir. 2006) (“The POMS does not have the force of law, but it is persuasive  
02 authority.”)

03 Also, given that she considered plaintiff’s allegation of disability as of June 15, 2007,  
04 the ALJ appears to have considered the time period relevant to the prior application. (*See* AR  
05 200 (plaintiff stopped working as of June 5, 2007, when she was fired for reasons other than her  
06 medical conditions); *accord* AR 49-50, 173, 187.)) *See also* *Lewis v. Apfel*, 236 F.3d 503, 510  
07 (9th Cir. 2001) (“When an ALJ de facto reopens [a] prior adjudication . . . , the Commissioner’s  
08 decision as to the prior period is subject to judicial review.”; treating the ALJ’s actions as a de  
09 facto reopening of an earlier application and assuming the onset date accepted by the ALJ,  
10 where the ALJ knew of denial of earlier application, but considered evidence of disability from  
11 the time period relevant to that application and accepted without comment an onset date within  
12 that time period). Yet, the ALJ’s decision does not acknowledge the existence of the prior  
13 application and appears to reflect the ALJ’s belief as to an absence of any medical records dated  
14 prior to 2008. (AR 28.) The Commissioner, while placing the burden of providing relevant  
15 medical records entirely on plaintiff, does not address the question of whether the Social  
16 Security Administration already has in its possession records associated with plaintiff’s prior  
17 application, but not included in the current record. Further, given the absence of any such  
18 explanation or records, it remains unclear whether, in fact, the prior denial of benefits could  
19 reasonably be deemed significant and any omitted medical records non-material.

20 The Court, in sum, finds insufficient information provided by the Commissioner in  
21 relation to this issue. The Court concludes that the ALJ should, on remand, address the issue  
22 of plaintiff’s prior application and the existence of any additional medical records associated

01 with the time period under consideration in this matter.

02 Medical Evidence

03 “The ALJ must consider all medical opinion evidence.” *Tommasetti v. Astrue*, 533  
04 F.3d 1035, 1041 (9th Cir. 2008). *See also* 20 C.F.R. §§ 404.1457(c), 416.927(c) (“Regardless  
05 of its source, we will evaluate every medical opinion we receive.”) In general, more weight  
06 should be given to the opinion of a treating physician than to a non-treating physician, and more  
07 weight to the opinion of an examining physician than to a non-examining physician. *Lester v.*  
08 *Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Uncontradicted opinions may be rejected only for  
09 “‘clear and convincing’” reasons, and contradicted opinions may not be rejected without  
10 “‘specific and legitimate reasons’ supported by substantial evidence in the record for so doing.”  
11 *Id.* at 830-31 (quoted sources omitted). Less weight may be assigned to the opinions of “other  
12 sources[.]” *Gomez v. Chater*, 74 F.3d 967, 970 (9th Cir. 1996), such as physical therapists, but  
13 the ALJ’s decision should reflect consideration of such opinions, Social Security Ruling (SSR)  
14 06-3p, and may discount the evidence by providing reasons germane to each source. *Molina v.*  
15 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (cited sources omitted). *See also* SSR 06-03p  
16 (ALJ should explain weight given to other source opinions or otherwise ensure that discussion  
17 of the evidence allows for following the ALJ’s reasoning “when such opinions may have an  
18 effect on the outcome of the case.”)

19 The ALJ need not discuss each piece of evidence in the record. *Vincent v. Heckler*, 739  
20 F.2d 1393, 1394-95 (9th Cir. 1984). Instead, “she must explain why ‘significant probative  
21 evidence has been rejected.’” *Id.* (quoting *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)).

22 In this case, plaintiff accurately identifies omissions in the ALJ’s assessment of the

01 medical record. Not all of those omissions reflect error. For example, the ALJ sufficiently  
02 addressed an August 2009 evaluation by Dr. Cynthia Greer (AR 25, 498-500), and was not  
03 required to discuss records from other physicians containing nothing more than diagnoses or  
04 reports of symptoms. *See Coleman v. Colvin*, No. 12-35207, 2013 U.S. App. LEXIS 7874 at  
05 \*3 (9th Cir. Apr. 19, 2013) (“mere diagnoses” did not meet standard of significant probative  
06 evidence requiring reasons for rejection). Nor does plaintiff establish reversible error in the  
07 ALJ’s failure to describe each treatment record from Dr. Mark Wentworth, where the ALJ  
08 sufficiently addressed evidence of findings of tenderness on examination as a general matter  
09 and Dr. Wentworth’s treatment of plaintiff in particular. (AR 28-29.)

10       However, the Court does find other omissions problematic. For example, the ALJ  
11 failed to discuss a May 2009 evaluation by examining physician Dr. Alysa Ruddell (AR  
12 345-49), or to explain why the opinions contained in that evaluation were rejected. Dr.  
13 Ruddell assessed plaintiff as severely impaired in her ability to learn new tasks and markedly  
14 impaired in her ability to exercise judgment and in several social categories. (AR 347-48.)  
15 The ALJ did refer to and discuss reports of “DSHS providers” and cited to an exhibit containing  
16 the report from Dr. Ruddell. (AR 25 (citing exhibit 4F).) However, the exhibit cited  
17 contained evaluations from three different physicians and the ALJ went on to provide reasoning  
18 associated with only two of those physicians – Dr. Shawn Kenderdine and Dr. Robert Warwick.  
19 (AR 26, 32.)

20       The Court finds unpersuasive the Commissioner’s contention that the failure to address  
21 the evidence from Dr. Ruddell was harmless because her findings were merely “cumulative”  
22 and the ALJ did discuss and declined to adopt opinions “containing much of the same findings



01 as Dr. Ruddell's." (Dkt. 21 at 10.) Instead, the Court finds the ALJ's failure to provide any  
02 reasoning in relation to the opinions of Dr. Ruddell to constitute reversible error. *Hill v.*  
03 *Astrue*, 698 F.3d 1153, 1159-60 (9th Cir. 2012) (error not harmless where ALJ failed to provide  
04 opinion of physician "any degree of review at all, and gave no reasons for doing so") (emphasis  
05 in original). *Cf. Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (while  
06 failing to discuss medical record, ALJ did discuss report on which record was based).

07 Further review of the ALJ's decision reveals other shortcomings in the discussion of  
08 the medical evidence. The ALJ, for example, failed to mention an October 2010 physical  
09 therapy status report from Susan McKenna, DPT COMT, assessing plaintiff as, *inter alia*,  
10 unable to stand for longer than ten minutes. (AR 948.) As with the evidence from Dr.  
11 Ruddell, the Court declines to find this omission harmless based solely on the fact that the ALJ  
12 rejected a similar limitation assessed by treating physician Dr. Warwick. *See Hill*, 968 F.3d at  
13 1159-60. Nor does it appear that the ALJ considered a June 2011 intake update form from  
14 Valley Cities Counseling containing a Global Assessment of Functioning (GAF) score of 45.  
15 (See AR 25, 878-81.) Also, while describing a May 2008 evaluation by examining physician  
16 Dr. Kenderdine in detail, the ALJ failed to directly acknowledge the second evaluation  
17 completed by Dr. Kenderdine in October 2009, instead referring generally to that and other  
18 reports by reference to "DSHS providers," as discussed above. (AR 25, 309-23, 328-36.)

19 Finally, while the Court finds no clear error established in the ALJ's consideration of  
20 other medical opinion evidence, it concludes that the above-described omissions potentially  
21 implicate the ALJ's consideration of that evidence. The Court further observes that the ALJ's  
22 decision is somewhat difficult to follow as a general matter. An ALJ may reject physicians'

01 opinions “by setting out a detailed and thorough summary of the facts and conflicting clinical  
02 evidence, stating [her] interpretation thereof, and making findings.” *Reddick v. Chater*, 157  
03 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). The ALJ should,  
04 therefore, take the opportunity on remand to clearly address and weigh all medical opinion  
05 evidence of record, including evidence from Dr. Ruddell, McKenna, Valley Cities Counseling,  
06 Dr. William R. Wilkinson, Dr. Warwick, Dr. Wentworth, and Dr. Kyong H. Kim, as well as  
07 evidence submitted to the Appeals Council after the ALJ’s decision.

#### 08 Credibility

09 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
10 reject a claimant’s testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)  
11 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). *See also Vertigan v. Halter*,  
12 260 F.3d 1044, 1049 (9th Cir. 2001). “General findings are insufficient; rather, the ALJ must  
13 identify what testimony is not credible and what evidence undermines the claimant’s  
14 complaints.” *Lester*, 81 F.3d at 834. “In weighing a claimant’s credibility, the ALJ may  
15 consider his reputation for truthfulness, inconsistencies either in his testimony or between his  
16 testimony and his conduct, his daily activities, his work record, and testimony from physicians  
17 and third parties concerning the nature, severity, and effect of the symptoms of which he  
18 complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

19 Plaintiff argues the ALJ failed to provide legally sufficient reasons for finding her less  
20 than fully credible. However, a review of the ALJ’s decision reveals the provision of several  
21 clear and convincing reasons for finding plaintiff less than fully credible.

22 The ALJ properly considered and reasonably construed evidence of plaintiff’s

01 drug-seeking behavior. (AR 31; *see also* AR 29.) *See Edlund v. Massanari*, 253 F.3d 1152,  
02 1157 (9th Cir. 2001), *amended opinion* at 2001 U.S. App. LEXIS 17960 (Aug. 9, 2001) (ALJ  
03 properly considered evidence of exaggeration of pain to receive pain medication in credibility  
04 assessment). *Accord Massey v. Comm'r SSA*, No. 10-35004, 2010 U.S. App. LEXIS 21508 at  
05 \* 2 (9th Cir. Oct. 19, 2010) (ALJ's interpretation of record that claimant engaged in  
06 drug-seeking behavior is a clear and convincing reason for disregarding his testimony). She  
07 properly and reasonably considered evidence of "significant pain behaviors, as well as a  
08 predominantly exaggerated presentation as demonstrated by positive Waddell signs and  
09 virtually no objective findings." (AR 31.) *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148  
10 (9th Cir. 2001) (ALJ appropriately considers a tendency to exaggerate); *Thomas*, 278 F.3d at  
11 959 (claimants "efforts to impede accurate testing of her limitations supports the ALJ's  
12 determinations as to her lack of credibility.") The ALJ also reasonably considered evidence of  
13 inconsistency in plaintiff's reporting and in relation to her behavior and activities of daily  
14 living. (AR 31-32.) *See Tonapetyan*, 242 F.3d at 1148 (inconsistencies or contradictions  
15 appropriately considered); *Thomas*, 278 F.3d at 958-59 (same); and SSR 96-7p ("One strong  
16 indication of the credibility of an individual's statements is their consistency, both internally  
17 and with other information in the case record.")

18       The ALJ also, elsewhere in the decision, considered evidence of normal or minimal  
19 objective findings. (*See* AR 28-32.) As the Commissioner observes, "[w]hile subjective pain  
20 testimony cannot be rejected on the sole ground that it is not fully corroborated by objective  
21 medical evidence, the medical evidence is still a relevant factor in determining the severity of  
22 the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th

01 Cir. 2001); SSR 96-7p. This reasoning could, therefore, also constitute a clear and convincing  
02 reason for finding plaintiff less than fully credible.

03 The Court, on the other hand, finds unclear the ALJ's statement that the "transient  
04 nature" of plaintiff's "pains" suggested inconsistency in reporting. (AR 32.) The Court  
05 further concludes that errors in the assessment of the medical evidence, and the possibility of an  
06 incomplete record, could implicate the ALJ's assessment of plaintiff's credibility. The ALJ  
07 should, therefore, reconsider plaintiff's credibility as necessary on remand. The ALJ should  
08 clearly identify all of the reasons offered in support of the credibility assessment and provide  
09 detailed explanations for her decision.

#### 10 RFC and Step Five

11 Plaintiff avers improper determination of her RFC based on the failure to include  
12 limitations assessed by Drs. Ruddell, Kenderdine, Wilkinson, and Warwick, and Ms.  
13 McKenna, as well as the limitations she described in her testimony. She also avers error at step  
14 five given the failure to include these limitations in the hypothetical proffered to the vocational  
15 expert. Given that the Court does find further consideration of the medical evidence and  
16 plaintiff's testimony warranted, the ALJ should also consider plaintiff's claims at steps four and  
17 five as necessary on remand.

#### 18 Remand

19 The Court has discretion to remand for further proceedings or to award benefits. See  
20 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of  
21 benefits where "the record has been fully developed and further administrative proceedings  
22 would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.

01 2002).

02 Such a circumstance arises when: (1) the ALJ has failed to provide legally  
03 sufficient reasons for rejecting the claimant's evidence; (2) there are no  
04 outstanding issues that must be resolved before a determination of disability can  
be made; and (3) it is clear from the record that the ALJ would be required to  
find the claimant disabled if he considered the claimant's evidence.

05 *Id.* at 1076-77.

06 The Court, in this case, finds an insufficient basis for plaintiff's requested remand for an  
07 award of benefits. Instead, the Court concludes that there appear to be outstanding issues that  
08 must be resolved prior to a determination of disability and that it is not clear from the record the  
09 ALJ would be required to find plaintiff disabled if she considered the evidence. This case  
10 should, therefore, be remanded for further proceedings.

11 CONCLUSION

12 For the reasons set forth above, this matter should be REMANDED for further  
13 administrative proceedings.

14 DATED this 6th day of December, 2013.

15  
16 

17 Mary Alice Theiler  
18 Chief United States Magistrate Judge  
19  
20  
21  
22